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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDY FRANK GONZALES, Defendant and Appellant.	B212258 (Los Angeles County Super. Ct. No. NA078908)

APPEAL from a judgment of the Superior Court of Los Angeles County, John D. Lord, Judge. Reversed in part, and affirmed in part.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Sonya Roth, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Andy Gonzales of misdemeanor battery and assault by means of force (his fist) likely to produce great bodily injury. In this appeal, Gonzales claims he suffered prejudicial instructional error, by virtue of the trial court's refusal to instruct the jury on simple assault. We agree.

PROCEDURAL BACKGROUND

On August 1, 2008, an information was filed charging Gonzales with two felony counts: (1) battery causing serious bodily injury (Pen. Code, § 243, subd. (d)[1]), and (2) assault with force likely to product great bodily injury (§ 245, subd. (a)(1).) As to count 1, the information also alleged that Gonzales had sustained three prior convictions under section 667.5, subdivision (b). Gonzales pleaded not guilty and denied the special allegations.

Following a three-day trial, the jury found Gonzales not guilty of felony battery (count 1), but guilty of the lesser included offense of simple battery (§ 242), and guilty as to count 2. Gonzales waived a jury trial on the priors, and admitted one prior conviction on cross-examination. The trial court found the special allegations to be true.

Gonzales was sentenced to seven years in state prison. The court stayed punishment for misdemeanor battery (count 1), and imposed the high term of four years for the aggravated assault (count 2), plus three consecutive one-year prison terms for each section 667.5, subdivision (b) enhancement. Gonzales received 231 days of presentence custody credits (155 days of actual time, plus 76 days of good time/work time). Gonzales was ordered to pay a court security fee and various fines.

FACTUAL BACKGROUND

Prosecution case

On July 5, 2008 at about 1:45 a.m., Ervin Mantilla was playing pool with his friend Eileen Roof at a bar in Avalon, on Catalina Island. As Mantilla was racking up the balls on the table, he accidentally knocked over a beer bottle sitting nearby, spilling some

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[1] All statutory references are to the Penal Code.

of its contents. The beer belonged to Gonzales. Gonzales angrily approached Mantilla, who had never seen Gonzales before, and demanded that Mantilla buy him a new drink. Mantilla refused. Gonzales continued to insist that Mantilla "buy him another fucking beer;" Mantilla continued to refuse. Gonzales then began to demand that Mantilla "go outside" with him, which Mantilla interpreted to mean that Gonzales wanted to fight. Mantilla refused.

Mantilla started walking away from Gonzales and around the pool table to break the rack. As he did so, Mantilla turned his head and Gonzales hit him in the jaw. Mantilla immediately collapsed, facedown, on the ground. He was unconscious.

Mantilla's friend, Cynthia Lopez, was walking toward the pool table just before Mantilla was hit. When Lopez was about eight feet away from Mantilla, Gonzales passed her on the left, moving toward Mantilla. She saw Gonzales punch Mantilla in the face as he turned his head, and saw Mantilla fall to the ground. Lopez went up to Mantilla, who appeared to be unconscious. His eyes were closed, his body was limp and he did not speak. When Mantilla regained consciousness about 30 seconds later, he was dizzy, bleeding from his mouth and had bumps on his forehead, below his eye and near his mouth.

Mantilla awoke in extreme pain.[2] His head throbbed, his nose was split open and his jaw was so swollen he could barely talk. He had a bump on his jaw and a lump the size of a golf-ball on his forehead. Although this incident caused Mantilla to experience the worse pain he has ever felt, he did not seek medical attention; he did not have insurance and could not afford it. A friend who worked at a hospital told Mantilla nothing was broken. Mantilla took Tylenol to ease the pain, which remained "extreme" for weeks and began to ease sometime in August. At trial, three months after the incident, Mantilla's injuries still had not healed completely; he still felt pain, although not

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[2] Mantilla described the pain as a "10" on a scale from "1 to 10," "1 being it didn't hurt at all, and "10 being extreme pain."

as much (now a "5" on a scale from 1 to 10). Mantilla still had bumps on his jaw and forehead, the remnants of two black eyes, and still felt pain if he pushed on his nose.

Defense case

Gonzales testified in his own defense. He said he became upset at the bar only after Mantilla refused to apologize for spilling his beer. At that point, Gonzales claimed he asked Mantilla, "Okay, if I can't get an apology, can I get a beer then?," but was not rude or impolite. Mantilla told him to "'F'off." That angered Gonzales, who asked Mantilla to step outside with him to talk because it was loud inside the bar. Gonzales claimed Mantilla pushed him in the chest, and told him "to get the 'F' away." Gonzales said that Mantilla—whom Gonzales said he saw all the time around the island—was particularly aggressive and angry with him because Gonzales had beat up Lopez's boyfriend a couple years earlier, and Mantilla remained angry about that. After Mantilla pushed him in the chest, Gonzales retaliated by hitting him in the eye. Gonzales claimed Roof would corroborate his testimony if she were called to testify.

Rebuttal

Roof was called to testify on rebuttal; she did not corroborate Gonzales's account of the incident. She said that, when she and Mantilla were playing pool, she saw Mantilla and Gonzales "having words" at the end of the pool table. She did not hear the whole argument, but did hear Gonzales say something about "going outside," and also heard Mantilla say, "no." About a minute later, as Mantilla looked away to grab a ball, Gonzales punched him in the jaw. Roof never saw Mantilla push Gonzales. After Gonzales hit Mantilla, Roof saw Mantilla "[sink] to his knees, and then he hit the ground really hard on his face, and he was out." Mantilla's body hit the floor with a "thud," and "bounced."

Roof immediately went to Mantilla. Before Roof got to him, Gonzales tried to pull Mantilla up, but he did not respond; his eyes were closed and his arms were limp. Mantilla looked as though he was unconscious, his nose was bloody and he looked battered. Roof said Mantilla did not regain consciousness for about 30 seconds, at which

point she went outside with him to get some fresh air, ice his face and to try to convince him to get medical attention. There was a lot of blood on the ground where Mantilla's face had hit. Roof saw a lump about the size of a golf-ball on Mantilla's forehead, and the left side of his face was very swollen. Outside the bar Gonzales continued to behave aggressively toward Mantilla and it appeared he still wanted to fight, as he asked Mantilla if "he wanted to go again." Roof called the police.

A detective from the Avalon Sheriff's station also testified. He had patrolled Catalina for 23 years, and had known Gonzales since he was a young teenager. Gonzales was known to the local police by the nickname, the "King of the Sucker Punches" because, during the past seven-to-eight years, Gonzales had participated in numerous altercations in which he had used a single punch either to knock someone out, or to inflict serious injuries.

DISCUSSION

The trial court instructed the jury on simple battery (§ 242) as a lesser included offense of count 1, but refused defense counsel's request for an instruction on simple assault (§ 240), as a lesser included offense of the aggravated assault charged in count 2 (§ 245, subd. (a)(1)). Gonzales maintains this was prejudicial error requiring reversal. We agree.

Instructional error

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and necessary for the jury's understanding of the case, including lesser included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149, 162; *People v. Heard* (2003) 31 Cal.4th 946, 980–981.) The duty to instruct as to the lesser offense "arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. [Citation.] This standard requires instructions on a lesser included offense whenever '"a

jury composed of reasonable [persons] *could . . . conclude*[ ]" ' that the lesser, but not the greater, offense was committed. [Citation.] In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*People v. Breverman, supra*,19 Cal.4th at p. 177.) The "purpose of the rule is to allow the jurors to convict of either the greater or the lesser offense where the evidence might support either." (*Id*. at p. 178, fn. 25.) Any doubt as to the sufficiency of the evidence requiring such an instruction should be resolved in favor of the defendant. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 476.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

A lesser offense is necessarily included in the charged offense if it meets either the "'elements test'" or the "'accusatory pleading test.'" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) "The elements test is satisfied when '"all of the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense."'" (*Ibid*.) The accusatory pleading test is satisfied "'"if the charging allegations . . . include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."'" (*Id*. at pp. 288–289.) The latter test is met if the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

"Great bodily injury," within the meaning of section 245, means "bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) Felonious assault in violation of section 245, subdivision (a), requires proof that a person was assaulted and that the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury. Felonious or aggravated assault is a general criminal intent crime, and requires proof only of an attempt to commit a violent injury upon the person of another. It does not require proof of an actual injury. (*People v. Griggs* (1989) 216 Cal.App.3d 734, 739–740.) Simple assault is an unlawful attempt, coupled with the

present ability, to commit a violent injury on another person. (§ 240.) Simple assault is a lesser included offense of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1); *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747.)

Gonzales first attempts to buttress his argument that a simple assault instruction was required by asserting that Mantilla's injuries were minimal, focusing on the fact that Mantilla failed to seek medical attention or to take anything stronger than Tylenol to ease his pain. One court has observed that, a "blow to the jaw sufficient to knock out the recipient is not unusual in fistic encounters and such a result from one blow is not ordinarily considered a great bodily injury for it is usual for the victim to recover consciousness and the use of his normal faculties within a short time . . . ." (*People v. Fuentes* (1946) 74 Cal.App.2d 737, 741, disapproved on another ground by *People v. Yeats* (1977) 66 Cal.App.3d 874, 879).) However, the view articulated in *Fuentes* has long since been discredited. (See *People v. Muir* (1966) 244 Cal.App.2d 598, 603–604 [noting that view that unconsciousness resulting from a blow to the jaw may not ordinarily be considered great bodily injury was always "out of tune" with the law of assault by any means of force likely to produce great bodily injury].)

In any event, Gonzales's effort to dilute the testimony is unavailing. We cannot agree that Mantilla's physical injuries were insignificant, trivial or moderate. Gonzales, known to the local constabulary as "King of the Sucker Punch," forcefully applied his fist to Mantilla's head and landed his victim instantly, with a single blow. Mantilla fell to the floor, face-first and passed out for 30 seconds. Afterwards, he suffered extreme physical pain. That pain continued for weeks, and Mantilla's injuries had not fully healed by the time of trial. On these facts, there can be no real question that Mantilla's injuries were significant. Great bodily injury is that which is "not insignificant, trivial or moderate." (*People v. Covino* (1980) 100 Cal.App.3d 660, 668.)

In any event, Gonzales's focus on the end result of the punch is misplaced. Section 245 prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which *in fact* produces such injury. Although the results of an assault

may be highly probative of the amount of force used, they cannot be conclusive. (*People v. Muir*, *supra*, 249 Cal.App.2d at p. 604.) We agree with those courts that have found that cases such as this, involving the stroke of a fist, may qualify as an assault likely to inflict great bodily injury only if the factfinder so determines. (*In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161–1162; *People v. McCaffrey* (1953) 118 Cal.App.2d 611, 617 [whether blow of fist or kick by shod foot was of such force as was likely to produce great bodily injury for assault is jury question]; but see *People v. Duke* (1985) 174 Cal.App.3d 296, 302–303 ["if hands, fists or feet, etc., are the means employed, the charge will normally be assault with force likely to produce great bodily injury"].)

People v. Rupert (1971) 20 Cal.App.3d 961, is instructive. In *Rupert*, a daughter intercepted a knife attack on her mother. (*Id*. at p. 968.) The defendant struck the daughter "at least five times, knocking her to the floor. She was additionally struck while on the floor. She sustained several cuts and a concussion." (*Id*. at p. 966.) The defendant thought he hit the daughter with his fist and a coffee pot. (*Id*. at p. 968.) He was charged with assault by means of force likely to produce great bodily injury. (*Id*. at p. 964.) The jury was not told it could consider convicting the defendant of simple assault. (*Id*. at p. 968.) On appeal, the court held the failure to so instruct was error. (*Id*. at pp. 968–969.) The court reasoned: "While the evidence is sufficient to support the jury's finding of assault by means of force likely to produce great bodily injury, the jury might also have reasonably concluded that no such force was used. If the jury so concluded, a verdict of guilty of simple assault would have been proper." (*Id*. at p. 968; see also *People v. Miller* (1981) 120 Cal.App.3d 233, 236.)

This case is analogous. While there is sufficient evidence to support the jury's finding of aggravated assault, the jury also could reasonably have found that Mantilla's serious injuries resulted from the force of his sudden fall to the floor, not the single blow to his jaw. Indeed, the fact that the jury rejected a charge of felonious battery in count 1 and convicted Gonzales only of simple battery, demonstrates a strong likelihood he may have fared better had the requested instruction for simple assault been given.

The error was prejudicial

In noncapital cases, the failure to instruct on a lesser included offense "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165; *People v. Watson* (1956) 46 Cal.2d 818, 836–837.) Reversal is required only if it is reasonably probable the jury would have returned a different verdict in the absence of the error about which appellant complains. (*People v. Rogers* (2006) 39 Cal.4th 826, 867–868.)

Unlike the test to determine whether substantial evidence supports the giving of a lesser included offense instruction, our "review focuses not on what a reasonable jury could do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman, supra,* 19 Cal.4th at p. 177.) Under this standard, there is a reasonable probability of a more favorable result "when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484, quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Applying this standard, the record reflects a relatively strong case that Gonzales assaulted Mantilla within the meaning of section 240. The evidence demonstrating force likely to product great bodily injury, on the other hand, is comparatively weak.

First, as discussed above, there is substantial evidence from which the jury could reasonably have found the single punch thrown by Gonzales constituted no more than a simple assault, i.e., that Mantilla's injuries resulted, not from the punch itself, but from his unprotected, face-first fall to the floor.

Second, the conclusion that Gonzales was prejudiced by the court's failure to instruct the jury as to the lesser included offense finds additional support in the fact that, during deliberations, the jury sent out a note asking how they should proceed with their deliberations "when We are At an impass & a few are Asking for . . . us to have an emotional compassion on eithe[r] party." This note constitutes strong evidence that at least some jurors may have felt forced into an all-or-nothing choice between felony assault and acquittal.

In the absence of an instruction on the lesser offense, the jury appears to have been faced with precisely the situation which the law requiring such instruction is designed to avoid. Failing to inform the jury of a lesser included offense "'impair[s] the jury's truth-ascertainment function' by forcing the jury 'to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.'" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 158, quoting *People v. Barton* (1995) 12 Cal.4th 186, 196.) The jury's apparent struggle with this "all or nothing" choice is reflected in the question it posed during deliberations. The question suggests some jurors were unable easily to find that the assault against Mantilla was conducted with force likely to produce great bodily injury. This struggle is understandable; the prosecution's case was not overwhelming. We conclude that the trial court's failure to instruct the jury on simple assault as a lesser included offense of count 2 was prejudicial under the specific facts and circumstances here. It is reasonably probable that Gonzales would have obtained a more favorable result had the jury been given the opportunity to convict him on the lesser charge of simple assault. Accordingly, his conviction on count 2 must be reversed.

DISPOSITION

The judgment is reversed as to Gonzales's conviction under count 2, for aggravated assault. The judgment as to count 1 is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.